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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1967

NO. 1142

DONALD F. UNDERHILL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(Petition for Writ of Certiorari To the Supreme Court of Illinois.)

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the "McNabb-Mallory Rule", excluding any confession made while illegally detained, should be applied to the states under the Fourteenth Amendment to the Constitution of the United States?

2) Whether any promise of leniency renders a confession inadmissible *per se*?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions are adequately set forth in the Petition (Pet. 3-5).

STATEMENT OF THE FACTS

Petitioner has adequately set forth the facts pertinent to the cause (Pet. 6-16).

ARGUMENT

I.

THE COURTS OF THE STATE OF ILLINOIS WERE NOT REQUIRED BY THE CONSTITUTION OF THE UNITED STATES TO DECLARE PETITIONER'S CONFESSION INADMISSIBLE PER SE FOR FAILURE TO TAKE HIM BEFORE THE NEAREST JUDGE WITHOUT UNNECESSARY DELAY.

Section 109-1 of the Code of Criminal Procedure (Ill. Rev. Stat. 1965, ch. 38, par. 109-1) provides:

> Persons Arrested.
>
> (a) A person arrested without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.
>
> (b) The judge shall:
>
> (1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.
>
> (2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.
>
> (3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense; and
>
> (4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

The Supreme Court of the State of Illinois has interpreted the aforementioned statute to the effect that a violation thereof does not *per se* void a confession but rather that said fact is only another factor to be considered by the trial judge on the question of the voluntariness of a confession. *People* v. *Carter,* 39 Ill. 2nd 31, 39; *People* v. *Taylor,* 33 Ill. 2nd 417, 422; *People* v. *Hall,* 413 Ill. 615.

The rationale of the interpretation and application of Section 109-1, by the Supreme Court of the State of Illinois, can be understood and appreciated when considered in the light of the "Totality of Circumstances Doctrine" propounded by this Court in *Haynes* v. *Washington,* 373 U.S. 503, and which is followed in this state. (*People* v. *Hartgraves,* 31 Ill. 2nd 375, 379). The "Totality of Circumstances Doctrine" in effect requires that the attendant factors surrounding a confession must be examined in view to their cumulative impact on an accused to determine if in fact the confession is a product of the free will or a product of psychological coercion.

In *McNabb* v. *United States,* 318 U.S. 332 and *Mallory* v. *United States,* 354 U.S. 449, this Court held that Rule 5(a) of the Federal Rules of Criminal Procedure (Pet. 5), which is similar to Section 109-1, required that a confession which was obtained in violation thereof was *per se* inadmissible.

The petitioner admits that the federal exclusionary rule is predicated upon an interpretation of Rule 5(a) rather than upon a violation of the Constitution of the United States (Pet. 19-21) but urges that said principle should be extended to the states under the Fourteenth Amendment to the Constitution (Pet. 21-24).

In an effort to lend support to his contention, the petitioner attempts to equate the situation presented to this

Court in *Mapp* v. *Ohio,* 367 U.S. 643, to the case at bar (Pet. 21-22). In the *Mapp* case, this Court had previously held that it is a violation of the Fourth Amendment to the Constitution to use evidence secured through an illegal search and seizure (*Weeks* v. *United States,* 232 U.S. 383). In *Mapp,* this constitutional violation was extended to the states under the Fourteenth Amendment.

There is a basic difference between the situation presented in *Mapp* and that presented here. In *Mapp* this Court was confronted with a procedure which as applied to the federal authorities was a violation of the Fourth Amendment to the Constitution. The question presented was therefore whether the same violation should be applicable to the states under the Fourteenth Amendment. This Court held that it was necessarily and properly encompassed therein. Here, however, an entirely different question is presented for neither a constitutional violation applicable to the federal authorities, nor the evil to be remedied are present.

Specifically there are two reasons why the "McNabb-Mallory Rule" should not be applied to the states. In the first instance it would require that this Court extend a Federal Rule of Procedure to the states under the Fourteenth Amendment when it has not declared that such a procedure is a violation of any of the first ten Amendments to the Constitution.

Secondly, and perhaps more important, is the question of the evil to be remedied. In *Mapp* v. *Ohio,* 367 U.S. 643, the Constitution prohibited the use of evidence obtained by illegal means in federal prosecutions, while the states were permitted to utilize such evidence. If the federal exclusionary rule was not extended to the states under the Fourteenth Amendment a citizen could legally be confronted with evidence illegally obtained. The ultimate

question was either the total admissibility or inadmissibility of illegally seized evidence; there was no middle ground.

The question presented here is unlike *Mapp,* for it is not whether a factual situation is to be ignored but rather in what manner it is to be considered.

The states are required to consider all facts which are relevant to the utterance of a confession in order to determine its validity under the "Totality of Circumstances Doctrine" under *Haynes* v. *Washington,* 373 U.S. 503, including the failure to take an accused before the nearest judge without unreasonable delay. Because the State of Illinois, or any other state, has not adopted the federal interpretation of a federal rule on the issue should not be determinative. Rather the salient element should be whether a state considers the issue to be an important question in determining the ultimate validity of a confession. This the State of Illinois has done.

The respondent submits that the courts of the State of Illinois were not and should not be required to consider the failure to take an accused before a judge without unreasonable delay as a *per se* violation of the Fourteenth Amendment to the Constitution of the United States, so long as they consider the fact as an element under the "Totality of Circumstances Doctrine".

II.

A PROMISE OF LENIENCY DOES NOT RENDER A CONFESSION INADMISSIBLE PER SE BUT RATHER SHOULD BE A FACTOR CONSIDERED AS AN ELEMENT UNDER THE TOTALITY OF CIRCUMSTANCES DOCTRINE.

The petitioner urges that his conviction should be reversed because his confession and that of his wife was

given only after the police had promised that his wife would receive probation if they confessed (Pet. 25-33). He contends that any offer of leniency prior to a confession renders the confession inadmissible *per se* and has cited several cases which he has interpreted to enunciate this principle (Pet. 28-32).

The authorities cited by the petitioner do not support the conclusion but rather collectively present the view that psychological coercion is equally as reprehensible as physical coercion.

In Point I of this Response, the respondent established that the State of Illinois, in following the "Totality of Circumstances Doctrine" as set forth by this Court in *Haynes* v. *Washington,* 373 U.S. 503, considers all facts which are relevant to the utterance of a confession in order to determine its validity. *People* v. *Hartgraves,* 31 Ill. 2nd 375, 379.

Rather than applying the conclusive label of *per se* to any promise or suggestion of leniency, reason requires that a state examine the fact in light of the totality of the circumstances because of ambit necessarily encompassed within the generic term of "promise of leniency".

In the case at bar, the promise of leniency of which the petitioner makes reference consisted of a request by the petitioner to keep his wife out of it and a reply on behalf of the police that they would not oppose probation (Pet. 10, 15). Surely, this fact taken alone should not be equated to a *per se* constitutional violation.

In applying the doctrine of "Totality of Circumstances" to the case at bar, the petitioner sets forth two factors which should be considered: (1) incommunicado detention in violation of Section 109.1 of the Code of Criminal

Procedure and (2) a promise of leniency for wife (Pet. 26-27).

In relation to the first factor, the respondent was not promptly presented to a judge but the testimony indicates that the petitioner was permitted to telephone a lawyer but was unable to reach him (Pet. 10). In relation to the question of promise of leniency, the Supreme Court of Illinois properly found that the evidence was conflicting and the police merely informed petitioner that they would not oppose probation but that it was not their prerogative to grant it (Pet. 9a).

It is submitted that the relatively short period of detention prior to confession and the mild inducement of leniency cannot be equated to such psychological coercion as to render the confession inadmissible.

CONCLUSION

In view of the foregoing the State of Illinois, respondent, respectfully submits that the petition for certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

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